U.S. Department of Labor

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Issue Date: 06 March 2003

CASE NO.: 2002-LHC-1295

OWCP NO.: 01-153455

IN THE MATTER OF:

JACK E. SLEPPY

Claimant

v.

ELECTRIC BOAT CORPORATION

Employer,

APPEARANCES:

SCOTT ROBERTS, ESQ.

For The Claimant

CONRAD M. CUTCLIFFE, ESQ.

For The Employer

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Jack E. Sleppy (Claimant) against Electric Boat Corporation (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 30, 2002, in New London, Connecticut. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 12 exhibits, Employer proffered 9 exhibits which were admitted into evidence along with

1 Joint Exhibits.[1] This decision is based upon a full consideration of the entire record.[2]

A post-hearing brief was received from Employer on October 30, 2002. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. The date of alleged injury is July 12, 2001.

2. That there existed an employee-employer relationship at the time of the accident/injury.

3. That the Employer was notified of the accident/injury on July 19, 2001.

4. That Employer/Carrier filed a Notice of Controversion on July 25, 2001.

5. That an informal conference before the District Director was held on February 27, 2002.

6. That Claimant's average weekly wage at the time of injury was $682.77.

II. ISSUES

The unresolved issues presented by the parties are:

1. Causation; fact of injury.

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[1] Claimant's exhibits 2, 9, and 10 were offered but ruling was reserved pending an evaluation of their admissibility under a Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) analysis. (Tr. 8). See infra, n. 15 (providing final determination of Daubert issue). In addition, receipt of Employer's exhibits 8 and 9 into evidence was reserved pending the deposition of Dr. Austin. (Tr. 11).

[2] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer Exhibits: EX-___; and Joint Exhibit: JX-___.

2. The nature and extent of Claimant's disability.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

At the time of the hearing, Claimant was 54 years old and employed at Employer's Quonset Point facility as an outside machinist. (Tr. 14, 22-23). He has worked for Employer since January 1990. (Tr. 23). Claimant was laid off in August 1996 and rehired in April 1998. (Tr. 15). Before being laid off in 1996, Claimant worked at Employer's Groton facility and performed essentially the same duties he performs today. (Tr. 25).

Claimant works in building 2003 at the Quonset Point facility. He describes this building as large, covering approximately 5 acres. Claimant relates the main task of the Quonset Point facility is the manufacture of submarine sections which are eventually shipped to other facilities for final assembly. (Tr. 25).

Claimant's duties include layout of components and installation and removal of various shipboard components. He testified component layout is a tedious task requiring reference to blueprints, lay out of holes, drilling, and welding. In the course of performing his duties, Claimant uses different types of tools some of which are air-fed vibratory tools.[3] He testified, while working at the Groton facility, he used air grinders, electric drills, hydraulic drills, burning machines, and impact guns. (Tr. 23-24). The day before the formal hearing, Claimant worked at the Quonset Point facility in a confined space ("belly of a boat") installing fitted pins. He used air tools, a buffer and grinder, to make a hole a specific diameter. (Tr. 26).

Claimant offered a detailed description of the mechanics of an impact gun. He described them as similar to a jack-hammer used to break concrete. The main difference being instead of the machine's weight resting on the ground, he is required to hold the machine in positions, sometimes overhead, where the weight of the machine and vibration is concentrated in his hands and arms. (Tr. 23-24, 43).

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[3] Claimant testified his use of air-fed vibratory tools varies; some days not using them at all and other days using them 5 out of 8 hours.

On cross-examination, Claimant stated the impact guns used in a shipyard were not like the “toy” ones used to remove tires in an automobile garage. He explained shipyard impact guns weigh 30 to 35 pounds and installed bolts 4 to 5 inches in diameter. (Tr. 42-43).

Claimant testified approximately three years ago he began to experience hand problems. Specifically, his hands would get cold and on occasion cramp. On cross-examination, he described his symptomatology similar to when he was a child and engaged in snowball fights without gloves causing his hands to ache. (Tr. 40). He states his wife complains about how cold his hands are and reminded Employer’s counsel that during his deposition counsel acknowledged Claimant’s hands were cold. (Tr. 28-29). Amusingly, Employer’s counsel noted he shook Claimant’s hands today and they were warm. (Tr. 44).

Initially, Claimant noticed his hand problem while riding his motorcycle. His hands would cramp making it difficult to use the bike’s clutch or brake levers. Eventually, Claimant disposed of his motorcycle because he was concerned, if he faced an emergency while riding, his hands might fail. (Tr. 26-27). Claimant testified his hand problem affects him at home and at work. Specifically, he may have difficulty holding the reins while riding a horse, steering a car, cutting a steak, holding a dinner plate, or performing a task at work. Claimant stated the cramping does not happen all the time and in some part is related to the type of tool and length of time used, but there is no set pattern. (Tr. 36-38, 41). For example, he related the day before the formal hearing he worked without any hand cramping. (Tr. 36-37). Claimant testified when he does experience cramping at work, if he catches it soon enough, he can flex his hand and work the cramp out. (Tr. 28, 39).

Claimant testified he did not report his hand problem to the dispensary at the Quonset Point facility because he did not think it was out of the “norm”. He felt it was normal because a lot of his co-employees have the same type of problem. Claimant explained it was not until his hand problem started occurring more frequently and became more severe that he realized he might have some sort of significant problem. (Tr. 27). On cross-examination, Claimant admitted “putting in” a claim on July 12, 2001. He stated no specific work incident occurred that day, but feels his hand problem developed gradually over time. (Tr. 38-39). Claimant has not lost any time from work because of his hand problem. (Tr. 35). He explained he could not afford to give up a $20 an hour job. (Tr. 43).

In August 2001, Employer had Claimant evaluated by Dr. Arnold-Peter C. Weiss. (Tr. 33; EX-4, p. 1). Claimant complains Dr. Weiss took no history and did not question him concerning his symptoms. He stated Dr. Weiss's entire examination took all of 4 or 5 minutes and it seemed to him his elevator ride to Dr. Weiss's office was longer. Claimant testified Dr. Weiss's examination consisted of squeezing his hands for grip strength and tapping the inside of his wrist. Claimant believes he "messed up" when Dr. Weiss questioned him concerning whether he experienced pain because when Dr. Weiss tapped his wrist his response was he did not have any pain. Claimant qualified this answer stating when he answered Dr. Weiss he was comparing his pain to painful events like an abscessed tooth, kidney stones, or a herniated disc. He testified the tap was uncomfortable, like a pinprick or prickle sensation up and down. In addition, Claimant stated Dr. Weiss misconstrued things he said. He contends Dr. Weiss noted that he used a chainsaw extensively when all he told him was he cut down three or four small trees in the last number of years.[4] (Tr. 33-35).

In September 2001, Claimant was referred, by his attorney, to Dr. S. Pearce Browning, III. (Tr. 29; CX-2, p. 1). He testified Dr. Browning spent about an hour with him during which time Dr. Browning took a history and performed a thorough examination. Claimant stated Dr. Browning questioned him about his job, his hand problem, and instances which caused him to seek medical help. He indicated Dr. Browning checked his reflexes, performed a sensory examination, tested grip strength, took finger temperature measurements and drew blood. Dr. Browning also referred Claimant for neurological and vascular evaluations. (Tr. 29-31).

Dr. Anthony G. Alessi performed Claimant's neurological evaluation in October 2001. (CX-4, p. 1). Claimant remembers the neurological testing as being electric shocks. (Tr. 31). Claimant's vascular evaluation was performed by Vascular Associates in November 2001. (CX-5, p. 1). Claimant testified upon arriving at Vascular Associates's office he waited in their waiting room for approximately a half-hour to forty-five minutes. Claimant estimates the testing, which was performed by a technician, also took about the same amount of time. He testified he never saw a physician at Vascular Associates, but the technician reported he definitely had a problem. (Tr. 31-32).

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[4] Claimant testified Dr. Weiss took no history (Tr. 33); however, Claimant takes issue with what would appear to be an attempt by Dr. Weiss to obtain a history. (Tr. 34-35). Dr. Weiss's records reflect Claimant "is very active working at home and uses a chain saw and weedwacker on a fairly common basis." (EX-4, p. 1).

After completing the neurological and vascular evaluations, Claimant returned to Dr. Browning. He stated Dr. Browning's consultation lasted approximately an hour. Claimant testified Dr. Browning took his time, went over his test results and explained his condition in detail. (Tr. 32-33).

The Medical Evidence

Arnold-Peter Weiss, M.D.

Dr. Weiss is a board-certified hand surgeon. He is also the director of the Hand Surgery fellowship at Brown University were he teaches hand surgery to medical students and residents. Dr. Weiss performed an "Independent Medical Evaluation" of Claimant on August 16, 2001. (EX-4, p. 1; EX-5, pp. 4-5).

Dr. Weiss obtained historical information concerning Claimant's work and home activities. Claimant related over the past several years he had experienced cramping in both hands and coldness and occasional numbness in his fingers. Dr. Weiss noted Claimant's range of motion of his wrist to be normal bilaterally and no hand musculature atrophy, fasiculations, or cramping. Dr. Weiss performed Phalen's and Tinel's test both of which were negative, bilaterally. Dr. Weiss noted Claimant showed no digital evidence of vascular changes and observed nail bed blood flow to be good. However, Dr. Weiss did not perform or order any objective diagnostic test. (EX-4, pp. 1-2).

Dr. Weiss's diagnosis was "focal dystonia bilateral hands". Dr. Weiss stated the etiology of Claimant's focal dystonia (writer's cramp) was unclear and he could not relate "to a probable degree of medical certainty" Claimant's symptoms to his on-the-job work activities. He opined Claimant exhibited no evidence of carpal tunnel syndrome. Despite the lack of any evidence of Raynaud's phenomenon, Dr. Weiss felt Claimant might have some underlying Raynaud's phenomenon because of his complaint of coolness in the winter. He did not assign work restrictions and returned Claimant to his customary work activities. (EX-4, p. 2).

Dr. Weiss was deposed on June 12, 2002. (EX-5, p. 1). He testified focal dystonia was a description rather than a clear entity and was associated with patients who have cramping without any specific cause. (EX-5, p. 10). On cross-examination, Dr. Weiss admitted working with one's hands could contribute to the onset of focal dystonia and it would not surprise him if work aggravated the condition. In addition, Dr. Weiss acknowledged he had patients who appeared to suffer with focal dystonia on a permanent basis. (EX-5, pp. 17-18). Dr. Weiss described Raynaud's

phenomenon as a spasm of digital or sometimes larger arteries which causes the fingers to mainly go white. He stated Raynaud's phenomenon could be the result of cold, vibratory stress or neither. (EX-5, p. 14).

Dr. Weiss testified his August 2001 diagnosis was to a reasonable degree of medical certainty at the time. He further opined to the same degree of medical certainty that Claimant's focal dystonia was not casually related to nor aggravated, exacerbated, or accelerated by his work activities with Employer. (EX-5, pp. 10-11). However, after reviewing Claimant's October 2001 electromyography test (EMG) he would now include a diagnosis of "peripheral neuropathy, mononeuropathy of multiple nerves" with some impairment which he opined was related to Claimant's work activity. (EX-5, pp. 11-12). Dr. Weiss's opinion was Claimant's neurological impairment with respect to numbness and tingling was 4% of the right and left hand using the AMA Guidelines, Fifth edition.[5] (EX-5, pp. 12, 15). Finally, Dr. Weiss was not impressed with Claimant's November 2001 vascular studies. He testified the vascular studies were not "terribly meaningful" and an impairment was not indicated based solely on vasospasm of the hand. (EX-5, pp. 19-20).

S. Pearce Browning, III, M.D.

Dr. Browning, a board-certified orthopedic surgeon specializing in hand practice, examined Claimant on September 19, 2001. Dr. Browning questioned Claimant concerning his work history. Claimant related he worked for a grocery store as a produce manager, served in the United States Navy as a Machinist Mate, and was employed as a millwright in a foundry. He stated while working at the foundry he sustained an injury to his neck and was treated conservatively. Claimant explained he injured his cervical spine when a 1,600 lb mold, being lift by a crane, began to swing out of control and he grabbed the mold and pulled hard to regain control. (CX-2, p. 2). Claimant reported he did not begin to use air driven tools until he started working for Employer. (CX-2, pp. 1-2; CX-9, p. 6). Claimant told Dr. Browning he began working at Employer's Groton facility in 1990, was laid off for a period, and rehired at Employer's Quonset Point facility in 1998.

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[5] Dr. Weiss disagreed with Dr. Browning's impairment rating of 40% for the right hand and 35% for the left hand testifying he never gives ratings that high except on patients who have sustained massive injury to the hands or severe trauma. He opined Dr. Browning's ratings were not based on reality. (EX-5, p. 13; CX-2, p. 5).

He related to Dr. Browning his duties with Employer require extensive use of air-driven vibratory tools. (CX-2, p. 1).

During this visit Claimant complained of pain, cramping, numbness, tingling, and paresthesias. Claimant also related his symptoms were aggravated by vibration and cold. (CX-2, p. 2; CX-9, p. 7). Dr. Browning's physical examination consisted primarily of a cervical range of motion evaluation, grip strength testing, upper extremity orthopedic and neurological tests[6], and finger temperature measurements. Dr. Browning also obtained cervical and bilateral knee x-rays and drew Claimant's blood for analysis.[7] Claimant's x-rays revealed significant cervical disc narrowing and damage at the C6-7 level. (CX-2, pp. 2-3). When questioned concerning his physical examination findings in relation to Claimant's hands, Dr. Browning explained Claimant's had a positive Phalen's test and fairly typical pattern of numbness which was not too extensive. (CX-9, p. 9). Dr. Browning also recommended Claimant undergo vascular and neurodiagnostic studies.[8]

In deposition, Dr. Browning testified Claimant's neurodiagnostic tests results were inconsistent with diabetic polyneuropathy, but revealed mild multiple mononeuropathies involving the median nerves bilaterally and the ulnar nerve at the right elbow. In regard to Claimant's vascular studies, Dr. Browning found Claimant's positive cold challenge test of

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[6] In direct contradiction of Dr. Weiss's examination, Dr. Browning noted bilaterally positive Phalen's and Tinel's test.

[7] Claimant's blood was screened for possible causes of peripheral neuropathy (e.g., rheumatoid arthritis, scleroderma, diabetes, or thyroid disease). (CX-9, pp. 12, 15). In deposition, Dr. Browning testified Claimant's blood work was "all right", but based on Claimant's glucose level he should undergo a glucose tolerance test, apparently to rule out diabetes. Dr. Browning advised Claimant to consult his personal physician for further evaluation; however, Claimant's own physician did not see any significance in the Claimant's glucose test result. (CX-2, p. 5; CX-9, p. 12).

[8] Dr. Browning advised the neurologist performing the electrodiagnostic studies to rule out cervical disc root involvement because of Claimant's complaints of muscle cramping and his prior cervical disc injury. (CX-2, p. 4; CX-9, pp. 32-33).

diagnostic importance. Dr. Browning explained that Dr. Bell's[9] impression of Claimant's vascular study was consistent with primary Raynaud's disease; however, it was his opinion Claimant's Raynaud's-like symptomatology was caused by the use of air-driven tools. (CX-9, pp. 12-14).

Dr. Browning testified when making his diagnosis it was important for him to take into consideration the entire medical system review (e.g., physical exam, laboratory work, electrodiagnostic testing, and vascular testing). In fact, Dr. Browning opined anything less was sloppy. (CX-9, pp. 17-18). Dr. Browning's impression was Claimant suffered from Hand/Arm Vibration Syndrome caused by the use of air-driven vibratory tools. (CX-9, p. 14). Based on Claimant's cold challenge test, Dr. Browning assigned a 20% impairment to Claimant's right hand and 25% to his left using the AMA Guides, Fifth edition. Next, taking into consideration Claimant's neurodiagnostic testing he assigned a 10% impairment of each median nerve and another 10% for Claimant's right ulnar nerve at the elbow. Overall, Dr. Browning assigned a 40% permanent partial impairment to Claimant's right hand and 35% permanent partial impairment to his left hand. (CX-2, p. 5; CX-9, p. 18).

Dr. Browning testified hand/arm vibration syndrome is treated conservatively, primarily with wrist splints and non-steriodal anti-inflammatories for flare-ups. He opined the best treatment is to try to get the patient away from the vibrating tools and to prevent cold exposure. (CX-9, p. 20).

On cross-examination, Dr. Browning acknowledged that his practice is more generalized than a hand practice. (CX-9, p. 21). He testified he has reduced his hours of practice and the greater part of his practice since 1999 has been the performance of "Independent Medical Evaluations". He state he last performed surgery in 1986. (CX-9, pp. 23-24).

In addition, Dr. Browning conceded Claimant's complaints at his initial examination were pain and cramping in his hands and his fingers curled up. (CX-9, p. 25). Dr. Browning also confirmed that hand/arm vibration syndrome is a collection of symptoms which include numbness, loss of strength in the hands, and blanching or whiteness, but Claimant had no history of whiteness of the hands. (CX-9, pp. 25-26).

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[9] Claimant's vascular studies indicate they were interpreted by Dr. T. Bell, M.D.; however, Dr. Ahamed testified he actually interpreted Claimant's test results. (CX-5, p. 1; CX-10, p. 11).

Dr. Browning also affirmed that Dr. Alessi's report refers to "mild" bilateral neuropathy and "mild" slowing of the ulnar motor nerve (CX-9, p. 27). Dr. Browning agreed that focal dystonia, Dr. Weiss's diagnosis, was a muscular contraction problem. (CX-9, pp. 30-31). He testified that cramping is not consistent with Raynaud's phenomenon. (CX-9, p. 31). Dr. Browning stated that a vascular rating is derived from a second volume of the AMA Guides entitled Master The AMA Guides. (CX-9, p. 36).

Anthony G. Alessi, M.D.

On referral from Dr. Browning, Claimant consulted Dr. Alessi on October 9, 2001 to undergo neurodiagnostic testing. Dr. Alessi is board-certified in neurology and electrodiagnostic medicine. (CX-4, p. 1).

Dr. Allessi's records indicate Claimant complained of bilateral hand cramping, cold hands, hand numbness and occasional neck pain from his prior cervical disc injury. (CX-4, p. 1). Dr. Allessi performed an EMG test on Claimant which revealed mild multiple mononeuropathies involving the median nerves bilaterally at the wrists and ulnar nerve at the right elbow. In addition, Dr. Allessi noted there was no evidence of peripheral polyneuropathy nor did he observe myotonic discharges or complex repetitive discharges commonly seen with complaints of cramping. (CX-4, pp. 2, 4).

Sultan Ahamed, M.D.

Following Dr. Browning's recommendations, Claimant underwent vascular testing at Vascular Associates on November 7, 2001. (CX-5, p. 1). Claimant's vascular studies were performed by a technician at Vascular Associates. The results of these studies were interpreted by Dr. Ahamed.[10] (CX-10, pp. 10-11). Dr. Ahamed, a partner at Vascular Associates, testified the technicians at Vascular Associates were certified through a national association which as part of its credentialing process required testing.[11] (CX-10, pp. 10-11, 33-35).

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[10] See supra n. 10.

[11] Dr. Ahamed was unable to say with any certainty the technician who performed Claimant's testing had passed any sort of test. He testified he depended on the director of the vascular lab to ensure technicians with the proper qualifications and credentials were hired. (CX-10, pp. 33-34).

The technician at Vascular Associates performed an upper non-invasive arterial exam and cold water immersion study. Dr. Ahamed's impression regarding the arterial exam was essentially normal. However, his impression concerning the findings of the cold water immersion study were consistent with primary Raynaud's syndrome. These findings were digital vessel spasm involving the 4th and 5th digits on the right and all 5 digits on the left. (CX-5, p. 1).

In deposition, Dr. Ahamed explained the hand testing protocol used at Vascular Associates. He testified the hand protocol consisted of two parts. First, pressure measurements were taken of the upper extremity. In Dr. Ahamed's opinion this portion of the testing took approximately a half-hour to 40 minutes. (CX-10, pp. 6, 10).

The second portion of the hand protocol consists of digital temperature measurements before and after cold water immersion. Dr. Ahamed testified that an initial temperature measurement of a patient's hand is recorded. This is termed the patient's baseline temperature. Next, the patient's hand is immersed in cold water. Following the immersion, temperature measurements of the patient's hand are taken in five minute intervals, to a max of twenty minutes. If a patient's temperature has not returned to its pre-immersion baseline temperature within 15 minutes Dr. Ahamed considers this to be a positive test.[12] (CX-10, pp. 13-14). Claimant's baseline temperature measurements ranged from 32 to 33 degrees. At 15 minutes post-immersion, Claimant's right 4th digit was at 28.5, right 5th digit was at 27, left 2nd digit was at 28, left 3rd digit was at 25.4 and left 4th and 5th digits were at 24.5. (CX-5, p. 7; CX-10, pp. 13-14).

On cross-examination, Dr. Ahamed admitted smoking, caffeine, and certain medications can cause vasospasm. (CX-10, pp. 40, 43-44). However, he testified the chance of obtaining a false

[12] Dr. Ahamed admitted prior to arriving at the 15-minute recovery time Vascular Associates had considered 10 minutes to be a normal recovery time. Dr. Ahamed explained he began to feel a 10-minute recovery time was too short and a 20-minute recovery time was too long. Dr. Ahamed stated 15 minutes seemed to be a reasonable compromise between 10 and 20 minutes. (CX-10, pp. 14-15).

positive under Vascular Associates hand protocol was minuscule.[13] (CX-10, 38-39).

Philo F. Willets Jr. M.D.

At the request of Claimant's counsel, Dr. Willets, an orthopedic surgeon, reviewed Claimant's medical records and offered his opinion concerning Claimant's impairment rating. He did not personally examine Claimant. Dr. Willets found fault with Dr. Weiss's and Browning's impairment assessments and the testing protocol used by Vascular Associates.

First, Dr. Willets disagreed with Dr. Weiss's finding that Claimant's hands were not impaired. (CX-6, p. 10). However, Dr. Weiss, after reviewing Claimant's EMG study, recanted his position and assigned a 4% impairment to each of Claimant's hands. (EX-5, pp. 11-12).

Next, Dr. Willets disagreed with Dr. Browning's impairment assessment. Unlike Dr. Browning, Dr. Willets placed little weight on Vascular Associates cold water immersion study. Dr. Willets found all Claimant's digits returned to reasonable temperatures with the exception of Claimant's left middle, ring, and small fingers. Dr. Willets reasoned the significance of the cold water immersion study was uncertain since Vascular Associates had failed to record a room temperature or equilibrium time from outside temperature.[14] (CX-6, p. 9). In addition, Dr. Willets felt a normal hunting reflex could leave a person with lower digital temperatures after ice water exposure. (CX-6, p. 8).

Dr. Willets also disagreed with Dr. Browning's interpretation of Claimant's electrodiagnostic test as a basis for an impairment

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[13] Of interest was counsel for Employer's ability to make suggestions concerning the improvement of Vascular Associates hand protocol which were accepted by Dr. Ahamed. For example, Dr. Ahamed agreed the pre-testing questionnaire should include an inquiry as to whether a test subject is taking medication, (CX-10, pp. 44-45), and pressure measurements should be correlated to Allen's test, a test of radial and ulnar artery integrity at the wrist. (CX-10, pp. 50-51).

[14] Dr. Ahamed acknowledged Dr. Willets's concerns, but insisted that for diagnostic purposes the most important measurements when interpreting the results of the cold water immersion test are the patient's baseline temperature and recovery time. (CX-10, pp. 21-23).

rating. In Dr. Willets's opinion, it was grossly inappropriate for Dr. Browning to use a finding of mildly slowed conduction velocity as a basis for awarding a 10% impairment. (CX-6, p. 9).

After reviewing the medical records, Dr. Willet's diagnosed Claimant with "some complaints and symptoms consistent with mild neuropathy both hands, conflicting evidence regarding carpal tunnel syndrome, no recorded reports of clinical Raynaud's syndrome, and minimal abnormalities on non-consensus vascular testing." (CX-6, p. 5). Dr. Willets, based on decreased sensation, assigned Claimant a 5% permanent partial physical impairment of the left and right hands and apportioned 4% to activity exposure with Employer. (CX-6, pp. 6-9).

Gregory J. Austin, M.D.

Dr. Austin, an orthopedic surgeon, performed a review of Claimant's medical records at the request of Employer. Like Claimant's reviewer (Dr. Willets), Dr. Austin offered his opinion concerning Claimant's diagnosis and associated impairment rating without personally examining the Claimant. (EX-8, p. 1; CX-12, pp. 5-6).

Dr. Austin noted the possible entities (focal dystonia, carpal tunnel syndrome, vibratory syndrome) from which Claimant may suffer have overlapping symptoms making a definitive diagnosis difficult. Although Dr. Austin had Dr. Weiss's and Dr. Browning's reports, he found them confusing as they were contradictory. He explained Claimant's diagnostic tests were not diagnostic by themself, but had to be synthesized into a diagnosis. When reaching his diagnosis, Dr. Austin also relied on Claimant's deposition. Dr. Austin found Claimant's major complaint to be cramping of the hands and involuntary motions which worsen with activity. Based on these findings, he diagnosed Claimant with focal dystonia unrelated to work. (EX-8, pp. 2-3).

In addition, Dr. Austin found Claimant had electrophysiologic abnormalities. He reasoned Claimant's neurological abnormalities were mild and therefore unrelated to carpal tunnel syndrome. (EX-8, p. 3). In deposition, Dr. Austin testified the most likely reason for Claimant's neuropathy was his use of vibratory tools. (CX-12, p. 15).

Dr. Austin also noted Claimant's vascular studies were interpreted as primary Raynaud's phenomenon. He could not relate this finding to Claimant's work and proposed Claimant's history of smoking was a contributing factor. (EX-8, pp. 3-4). However, in deposition Dr. Austin admitted Raynaud's phenomenon can be induced or triggered by exposure to vibratory tools. (CX-12, p. 12).

Dr. Austin testified Claimant's diagnosis was focal dystonia of the hands, mild neuropathy, and primary Raynaud's phenomenon. (CX-12, p. 9). Dr. Austin did not assign any impairment rating to Claimant's left upper extremity, but did for the right. Based on Claimant's right median nerve abnormalities, Dr. Austin using the AMA Guides, Fifth edition, assigned a 5% impairment rating to the right upper extremity. Additionally, he assigned another 5% impairment based on right ulnar nerve abnormalities. As a result, Dr. Austin's total impairment rating of Claimant's right upper extremity was 10%. (EX-8, pp. 3-4). On redirect examination, Dr. Austin admitted a 10% impairment of the upper extremity could be translated into an 11% impairment of the hand. (CX-12, p. 18).

The Contentions of the Parties

Claimant contends as a result of long-term cumulative use of vibratory tools at Employer's facility, he has sustained hand-arm vibration syndrome (HAVS). Claimant bases his HAVS claim on Dr. Browning's diagnosis.

Employer, on the other hand, asserts Claimant's appropriate diagnoses is focal dystonia, mild neuropathy, and primary Raynaud's phenomenon. These diagnoses are supported by Dr. Weiss and Dr. Austin. In addition, Employer argues Dr. Browning's reports and deposition should be excluded on the basis of its Daubert motion.[15]

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir.

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[15] At the hearing, Employer urged a "Daubert" motion without supporting legal memorandum. In post-hearing brief, Employer failed to argue its motion or provide any further supportive legal analysis. Accordingly, I find Employer'S motion to be without merit since an administrative law judge is not bound by formal rules of evidence. See Jones v. Aluminum Co. of America, 35 BRBS 37, 40 n. 4 (2001)(finding Daubert inapplicable to administrative hearings); Casey v. Georgetown University Medical Center, 31 BRBS 147 (1997); Peabody Coal Co. v. McCandles, 255 F.3d 465 (7th Cir. 2001)(reasoning Daubert does not apply directly in black lung cases, because it is based on Fed. R. Evid. 702, which agencies need not follow because agencies have the skill needed to handle evidence that might otherwise mislead a jury).

1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Disease or Injury

A brief discussion of HAVS is necessary.[16] HAVS is a relatively new type of claim, and although HAVS has been recognized for some time in Canada and England, and perhaps other European countries, it was not until 1989 that the National Institute for Occupational Safety and Health (NIOSH), an agency of the United States Department of Health and Human Services, published criteria for recognizing and reducing the risk of occupational exposure to hand-arm vibration.

NIOSH defines HAVS as a "chronic, progressive disorder with a latency period that may vary from a few months to several years." The most common health problem associated with the occupational use of vibrating tools are signs and symptoms of peripheral vascular and peripheral neural disorders of the arms, hands, and fingers. These signs and symptoms, some of which are shared with other repetitive-strain phenomenon, include tingling, numbness, pain and blanching of the fingers, loss of grip strength, reduction in

[16] The majority of HAVS information set forth herein is borrowed from Morgan v. Ingalls Shipbuilding, Inc., 29 BRBS 508 (ALJ) (August 25, 1995). HAVS was first recognized and discussed by the National Institute for Occupational Safety and Health (NIOSH) in September 1989 (Publication No. 89-106), the original source of much of the information presented in Morgan. See also Snowden v. Ingalls Shipbuilding, Inc., Case No. 1998-LHC-1164 (June 17, 1999) (unpublished).

finger dexterity, and sometimes sleep disturbances at night. This composite of signs and symptoms has also been called "vibration white finger" disease, cumulative trauma disorder and Raynaud's phenomenon. HAVS appears to affect the peripheral nerves and vascular systems directly. The treatment options for HAVS are extremely limited essentially consisting of removal of the worker from the injurious stimuli of the workplace to ease the painful symptoms. Surgery usually provides little relief to true HAVS patients, as surgery cannot restore damaged peripheral nerve fibers.

NIOSH estimates that, on average, almost one-half of all workers who routinely use vibrating tools will develop HAVS. This figure falls within the pervasiveness of all repetitive-strain injuries, which the Occupational Safety and Health Administration (OSHA) recently estimated accounts for 60% of all workplace illness. Development of the disease depends upon a number of factors, most important of which are the amount of vibration (level of acceleration) of the tool, daily and cumulative toll usage, ergonomics of tool use (how the tool is held) and latency period (time between exposure and first signs or symptoms).

No single test is sufficient for a HAVS diagnosis, as not all patients exhibit all symptoms. Instead, diagnosis is usually based on a combination of positive test results and employment history. Several tests can be used to help substantiate a clinical diagnosis of HAVS. Principal among these tests are cold provocation, finger plethysmography, aesthesiometry, grip force, nerve conduction and sensory acuity.

B. Is HAVS an Injury or Disease?

Section 2 of the Act, in pertinent part, defines "injury" as ". . . such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . ." 33 U.S.C. § 902(2). Professor Arthur Larson points out two crucial points of distinction between accidents and occupational diseases the latter of which is reflected in part as: (1) an inherent hazard from continued exposure to conditions of a particular employment; and (2) a gradual, rather than sudden, onset.[17]

The Second Circuit has defined occupational disease as requiring the satisfaction of three elements: (1) the employee must

[17] A. Larson, Workmen's Compensation Law, § 41.31 (1993).

suffer from a disease (as opposed to a traumatic injury); (2) hazardous conditions surrounding the employment must be of such nature as to cause the disease (coal dust, asbestos, radiation, etc.); and (3) the conditions must be peculiar to the specific occupation, as opposed to employment in general. Grain Handling v. Sweeney, 102 F.2d 464, 465 (2d Cir. 1939), cert. denied, 308 U.S. 570 (1939); see also LeBlanc v. Cooper/T. Smith Stevedoring, Inc., 130 F.3d 157, 159 (5th Cir. 1997); Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025, 1030 (5th Cir. 1985).

Although it could be argued that HAVS results from a traumatic injury, I find that based upon the information in the NIOSH report, it is more reasonable to conclude that it is a disease caused by repetitive injurious vibrations. Hand problems have been considered both an occupational disease and an injury, depending upon whether the problem arose from a single violent episode or repetitive trauma. See e.g., Johnson v. Director, OWCP, 911 F.2d 247 (9th Cir. 1990); Morgan, supra, n. 5. However, unlike carpal tunnel syndrome, according to the well-reasoned and credible medical opinions presented in this matter, HAVS develops as a result of long-term exposure with a significant delay between the exposure and onset. Thus, I find and conclude that HAVS should be classified as a disease, which satisfies the first requirement of the Second Circuit test.

Furthermore, HAVS has been recognized as a disease in official government reports, such as the NIOSH report, and other publications which document that the continued and prolonged use of vibratory tools may be hazardous to a person's upper extremities. Therefore, the second requirement has been met.

Finally, the third requirement is met as well. Conditions, such as using vibratory tools, which give rise to HAVS are present in numerous occupations, such as shipyard work, in which such tools are used, but are not present in all employment. In the present case, Claimant's prior employment included work in a grocery store as a produce manager, service in the United States Navy as a machinist, labor with a foundry as a millwright, and employment with Employer as a machinist. Claimant reported he started using air-driven tools when he began working with Employer. Claimant credibly testified his duties with Employer commonly require the use of air-fed vibratory tools. He stated his use of vibratory tools with Employer varies; some days not using them at all and other days using them 5 out of 8 hours. Thus, having met the criteria of Professor Larson and the Second Circuit, I find that in this particular instance, HAVS is an industrial or occupational disease, rather than an episodic event.

C. Compensable Injury/Disease

As previously noted, Section 2 of the Act, in pertinent part, defines "injury" as ". . . such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . ." 33 U.S.C. § 902(2). A presumption that an injury arose out of employment arises once a claimant establishes a **prima facie** claim for compensation. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). In order to establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that he sustained physical harm or pain and that an accident occurred in the course of employment, or that conditions existed at the workplace which could have caused the harm or pain. Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984); Kelaita v. Triple A. Mach. Shop, 13 BRBS 326 (1981), aff'd sub nom., Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

1. Physical Harm or Pain

In the present case, Claimant credibly testified he began experiencing hand problems approximately three years ago. Specifically, his hands would get cold and on occasion cramp. Claimant did not report his hand problems to Employer because he did not think it was out of the "norm." He explained it was not until his hand problems started occurring more frequently and became more severe that he realized he might have a significant problem.

Claimant was first seen by Dr. Weiss. During his initial visit with Dr. Weiss he reported he had experienced cramping in both hands and coldness and numbness in his fingers over the past several years. Dr. Weiss diagnosed Claimant with focal dystonia. When Claimant consulted Dr. Browning, he complained of hand pain, cramping, numbness, tingling, and parathesias and related that these symptoms were aggravated by vibration and cold. Dr. Browning recommended neurological and vascular studies and after reviewing these studies made a diagnosis of HAVS.

Given the liberal construction of the Act, the credible testimony of Claimant and the medical evidence of record, a finding that Claimant incurred a physical harm or pain is supported by the instant record. Thus, I find that Claimant has shown that he suffered a harm or pain and has consequently met the first element of a **prima facie** claim for compensation.

2. Accident or Conditions At Workplace

In addition to meeting the first element of a **prima facie** claim, Claimant must also show that an accident at work or conditions in his workplace could have caused the pain or harm. Kier, supra.

The injury alleged in this case is that Claimant has HAVS, which he further contends was the result of long-term vibratory tool use at Employer's facility. Claimant testified he began working for Employer in January 1990. He stated he was laid off in August 1996 and rehired in April 1998. Claimant testified his duties with Employer before and after his layoff were essentially the same.

Claimant's duties with Employer require him to use various tools including air-driven vibratory tools. Specifically, he has used air grinders, electric drills, hydraulic drills, burning machines, and impact guns. Claimant testified the mechanics of the impact guns used at the shipyard were similar to the mechanics of a jack-hammer used to break concrete. He explained the main difference between a jack-hammer and the impact guns he uses was that a jack-hammer's weight rested on the ground while the weight of the impact gun he uses rest in his hands and arms.

In light of the foregoing, I find that a preponderance of the testimonial evidence establishes that conditions in Claimant's workplace existed which could have caused Claimant's harm or pain. Accordingly, Claimant has invoked the Section 20(a) presumption and established a **prima facie** claim for compensation.

3. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden then shifts to Employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition

was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

After weighing the medical evidence presented by the parties, I find and conclude that the record does not establish a causal connection between Claimant's alleged injury of HAVS and his employment with Employer. Nevertheless, the medical evidence does establish the existence of a mild neuropathy involving both hands which is, to some degree, related to Claimant's work activities with Employer. Finally, the medical evidence inconclusively acknowledges Claimant may suffer with non-work related Raynaud's phenomenon. Thus, I find and conclude for the following reasons that Employer has rebutted Claimant's **prima facie** case in regard to HAVS. However, Claimant's neuropathy was caused by his employment with Employer and is, to some extent, compensable.

Claimant's bases his HAVS claim on Dr. Browning's diagnosis. Dr. Browning after examining Claimant recommended further diagnostic testing. Specifically, Claimant underwent neurological and vascular testing. Dr. Browning referred Claimant to Dr. Alessi who performed electrodiagnostic testing. Claimant's EMG test revealed mild multiple mononeuropathies involving the median nerves bilaterally at the wrists and the ulnar nerve at the right elbow. Claimant also underwent vascular testing at Vascular Associates. Dr. Ahmed interpreted Claimant's vascular studies and his impression was the test results were consistent with primary Raynaud's phenomenon. After reviewing Claimant's physical exam findings and neurological and vascular test, Dr. Browning diagnosed Claimant with HAVS.

Based on Claimant's cold challenge test, Dr. Browning assigned a 20% impairment to Claimant's right hand and 25% to his left. Next, taking into consideration Claimant's neurodiagnostic testing

he assigned a 10% impairment of each median nerve and another 10% for Claimant's right ulnar nerve at the elbow. Overall, Dr. Browning assigned a 40% permanent partial impairment to Claimant's right hand and 35% permanent partial impairment to his left hand.

Dr. Browning's diagnosis is not shared by Dr. Weiss who personally examined Claimant nor is it shared by Dr. Willets or Dr. Austin who reviewed Claimant's medical records. Dr. Weiss originally diagnosed Claimant with non-work related "focal dystonia bilateral hands." He also felt Claimant might have some underlying Raynaud's phenomenon. After reviewing Claimant's electrodiagnostic test results, Dr. Weiss revised Claimant's diagnosis and included a diagnosis of "peripheral neuropathy, mononeuropathy of multiple nerves". Dr. Weiss assigned a 4% impairment rating to each of Claimant's hands. In addition, Dr. Weiss noted Claimant's impairment was related to his work-activities with Employer.

Besides differing with Dr. Browning's diagnosis, Dr. Weiss disagreed with Dr. Browning's impairment rating. Specifically, Dr. Weiss testified Dr. Browning's impairment ratings were not based on reality. Dr. Weiss stated impairment ratings as high as Dr. Browning's should only be given when a patient has sustained massive injury to the hands or severe trauma.

Next, Dr. Willets, Claimant's "independent reviewer", diagnosed Claimant with "some complaints of and symptoms consistent with mild neuropathy both hands, conflicting evidence regarding carpal tunnel syndrome, no recorded reports of clinical Raynaud's syndrome, and minimal abnormalities on non-consensus vascular testing." Dr. Willets assigned Claimant a 5% permanent partial physical impairment of the left and right hands and apportioned 4% to activity exposure with Employer.

Like Dr. Weiss, Dr. Willets also found fault with Dr. Browning's interpretation of Claimant's electrodiagnostic test as a basis for an impairment rating. Dr. Willets noted it was grossly inappropriate for Dr. Browning to use a finding of mildly slowed conduction velocity as a basis for awarding a 10% impairment. Unlike Dr. Browning, Dr. Willets placed little weight on Claimant's vascular studies. Dr. Willets found that Claimant's cold water immersion test results were uncertain because Vascular Associates did not record room temperature or equilibrium time from outside temperature. He also stated a normal "hunting reflex" could explain Claimant's digital temperatures after ice water exposure.

Finally, Dr. Austin, Employer's "independent reviewer", diagnosed Claimant with focal dystonia of the hands, mild neuropathy, and primary Raynaud's phenomenon. Dr. Austin did not

relate Claimant's focal dystonia or Raynaud's phenomenon to his work activities, but he testified the most likely reason for Claimant's neuropathy was exposure to vibratory tools. Dr. Austin assigned a 10% impairment to Claimant's right upper extremity. On re-direct, Dr. Austin acknowledged that a 10% impairment of the upper extremity could be translated into an 11% impairment of the hand.

In conflict with Dr. Browning's diagnosis, Dr. Austin noted Claimant's major complaints were cramping of the hands and involuntary motions which worsened with activity. Dr. Austin felt these findings supported Dr. Weiss's diagnosis, focal dystonia.

4. Conclusion

In light of the foregoing, I find the weight of medical evidence does not support a diagnosis of HAVS. I find the majority of the physician's impressions (Dr. Weiss, Dr. Willets, and Dr. Austin) are in agreement. Therefore, I conclude Claimant does not have work-related HAVS and his appropriate diagnosis is focal dystonia, bilateral hand peripheral neuropathy, and primary Raynaud's phenomenon. Further, I find Claimant's focal dystonia and primary Raynaud's are not work-related; however, his bilateral hand peripheral neuropathy is work-related and is compensable under Section 8(c)(3) of the Act as a scheduled injury.

D. Scheduled Permanent Partial Disability

In determining the percentage of disability, an administrative law judge may evaluate a variety of medical opinions and observations in addition to the claimant's own description of the effects of his injury. Pimpinella v. Universal Maritime Service Incorporated, 27 BRBS 154, 159 (1993). Moreover, the Act does not require adherence to any particular formula for determining the extent of disability nor is an administrative law judge bound by any particular physician's opinion or any particular edition of the AMA Guides. Mazze v. Frank J. Holleran, Jr., 9 BRBS 1053, 1055 (1978); Rosa v. Director, OWCP, 141 F.3d 1178 (unpublished), 33 BRBS 121 (CRT) (9th Cir. 1998).

In the present matter, having determined that Claimant suffered a scheduled injury, bilateral hand peripheral neuropathy, pursuant to Section 8(c)(3) of the Act it remains to be determined the percentage of impairment which will be assigned for this scheduled injury. Here again, the medical evidence is in conflict; however, the majority of credible medical evidence is similar.

Claimant's diagnosis is based upon the impressions of Dr. Weiss, Dr. Willets, and Dr. Austin. Dr. Weiss's opinion was Claimant's neurological impairment with respect to numbness and tingling was 4% of the right and left hand. In a like manner, based on decreased sensation, Dr. Willets assigned a 5% permanent partial physical impairment to Claimant's left and right hands and apportioned 4% to activity exposure with Employer.

Unlike Dr. Weiss and Dr. Willets, Dr. Austin did not assign any impairment rating to Claimant's left upper extremity. However, he did assign a 10% impairment to Claimant's right upper extremity and acknowledged that a 10% impairment of the upper extremity could be translated into an 11% impairment of the hand.

In light of the foregoing, I find the majority of the physician's impressions concerning impairment (Dr. Weiss and Dr. Austin) are in accord. Therefore, I find the weight of medical evidence supports an assignment of 4% impairment to each of Claimant's hands.

Under Section 8(c)(3) and (19) the loss of the use of a hand entitles Claimant to 9.76 weeks (4% x 244 weeks = 9.76 weeks) of compensation for permanent partial disability, based on an average weekly wage of $682.77 for a total of $6,663.83. However, this amount must be doubled because each of Claimant's hands were assigned a 4% impairment rating. Therefore, Claimant is entitled to a lump sum permanent partial compensation payment of $13,327.66 ($6,663.83 x 2 = $13,327.66).

V. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative

application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VI. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[18] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer shall pay Claimant the sum of $13,327.66 as compensation for the scheduled permanent partial disability to Claimant's left and right hands based on an average weekly wage of $682.77 for 9.76 weeks each hand in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(3) and (19).

2. Employer shall pay all reasonable, necessary and appropriate medical expenses associated with Claimant's hand conditions pursuant to Section 7 of the Act.

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[18] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 8, 2002,** the date this matter was referred from the District Director.

3. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

4. Claimant's attorney shall have thirty (30) days from the date of service of this Decision and Order by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days from date of service to file any objections thereto.

ORDERED this 6th day of March, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge